Filed 11/5/10 In re Anthony M. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re ANTHONY M. et al., Persons Coming Under the Juvenile Court Law.	B221629 (Los Angeles County Super. Ct. No. CK78655)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DOMINIQUE A., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Marilyn Mordetzky, Juvenile Court Referee. Affirmed.

Janice A. Jenkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and Respondent.

Dominique A. appeals from the jurisdictional and dispositional orders in the dependency proceedings concerning her children Anthony M., Destiny M., and Jaime M. Her sole contention on appeal is that she did not receive notice of the jurisdictional and dispositional hearing. We affirm.

Facts

On August 27, 2009, DCFS received a report that appellant had engaged in a physical altercation with her pregnant 14 year old daughter A. and had been arrested. At that time, Anthony was 7 years old, Destiny was 4, and Jaime was 2. A. was under the legal guardianship of her maternal grandparents and had been for several years. She was released to them. The other children went to foster care.

On September 1, 2009, DCFS filed a Welfare and Institutions Code[1] section 300 petition, bringing allegations under subdivisions (a), (b), (g), and (j). Factual allegations included allegations about the altercation with A., allegations that appellant had abused Anthony and Destiny on prior occasions, allegations that there had been domestic violence between appellant and the children's father, allegations that appellant had a history of substance abuse and was an abuser of alcohol, and allegations that the children's father had failed to provide for them.

At a hearing on September 1, 2009, the court found a prima facie case for detaining the children. Appellant was given notice of the hearing but did not attend. Monitored visits and reunification services were ordered for her and a pre-trial resolution hearing was set for October 7. Appellant was served with a copy of the minute order. Later, she was served with a notice of the October 7 hearing and copy of the section 300 petition. The notice stated, inter alia, that a "jurisdiction/disposition hearing" would be held and that "the court may proceed with this hearing whether or not you are present."

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[1] All further statutory references are to that code.

Appellant was not present at the October 7 hearing, due to her incarceration. The court continued the hearing until October 14 and ordered her removal from County Jail for that date, but appellant was not transported to court for the hearing. The hearing was continued until November 2 and a new order was issued. Appellant was transported to court for that hearing. Counsel was appointed for her and she entered a denial of the petition. The case was continued to December 1 for mediation or a further pre-trial resolution hearing. A mediator was assigned to the case. The court told appellant that "if you're released prior to that date, you're ordered back for December 1, 2009, 8:30, in this Department. If you're not here on that date, the court will proceed without you. If you're incarcerated, I'll see to it that you are brought in."

Appellant was released from jail on November 4. A social worker called her to set up a meeting, telling her that the meetings were to discuss referrals for therapy and drug testing and to arrange visits with the children. Appellant did not attend any of the three meetings the social worker scheduled.

Appellant was present on December 1, and, through counsel, asked to set the matter over until December 8. The court asked whether the continued hearing would be for further mediation. Counsel for DCFS said that "I think it's more of a talking PRC-type thing. If we need mediation, that's fine." Appellant's counsel said "Let's call it mediation because [the mediator] was to, you know, come up with some language in talking to the Mom." Appellant's counsel then represented that she could not appear on December 8, but that given that it was the only possible date for mediation, would leave careful notes for her stand in. The court told appellant, "Mother, you're ordered back for December 8, 2009, for further mediation. If you're not present, the court will proceed without you."

Appellant was not present on December 8. Counsel for DCFS represented that on December 1, "the mediator came up with language with Mother which DCFS agreed to. The matter was not put on the record. I don't know what, if any, issues arose in the afternoon, but it was continued to this date for a further proceeding." DCFS asked to go

forward with adjudication in appellant's absence, using the mediation agreement "which was a product of the mother and mediator's work." Appellant's attorney represented that previous counsel's "notes to me tell me that the mother was not in agreement with this mediated so-called agreement that we received from mediation." Counsel asked that a contest be set, noting that "I don't think it has to be very far down the road, as [appellant's counsel] is actually due back tomorrow."

The court denied the request, admitted DCFS reports into evidence over appellant's objection that "we're asking for a contest," and sustained the petition under subdivisions (a), (b), and (g), as amended. The sustained factual allegations under (a) concerned the August 27, 2009 altercation with A. The sustained factual allegations under (b) were that appellant had a history of substance abuse and currently drank alcohol to excess, interfering with her ability to provide care for the children, and that appellant and the children's father had a history of domestic violence. The sustained factual allegation under subdivision (g) was that the children's father had failed to provide for them. The sustained petition is identical to the mediation agreement signed by DCFS.

The court then proceeded to the dispositional hearing, again denying appellant's request for a contest. The court ordered the children removed from appellant and ordered her to attend random and on-demand drug and alcohol testing, parent education, individual counseling to address case issues including parenting for pre-teens and difficult teenagers, anger management, domestic violence for victims, and grief issues. If appellant had a positive drug or alcohol test or missed a test, she would have to attend a substance abuse program. Those orders were, again, consistent with the mediation agreement.

Discussion

Appellant argues that her non-appearance was treated as a default, and that her due process rights to notice, to present evidence, and to cross-examine were violated when the court proceeded with the jurisdictional and dispositional hearing, when the notice was

of a mediation. As she argues, several cases have found due process violations under similar circumstances.

Thus, in *In re Dolly D.* (1995) 41 Cal.App.4th 440, the father was not present for a mediation. The court deemed him "in default" and denied his request for a "default prove-up" in which the social worker would testify. Instead, the court determined the jurisdictional issue based on the DCFS reports and on the father's failure to appear. Division 4 of this Court found that by refusing the hearing, the court denied the father his right to confront and cross-examine the social worker who prepared the report, "a clear violation of his rights." (*Id.* at p. 445.)

Similarly, in *In re Stacy T.* (1997) 52 Cal.App.4th 1415, after mother failed to appear at a settlement conference, the juvenile court announced that it would enter her default, and denied her counsel's request to examine the preparers of the social service reports. (*Id.* at p. 1421.) The Court of Appeal found multiple violations of the mother's due process rights: "The court did not tell her that failure to appear at the settlement conference would result in her 'default.' Nor did it tell her of the serious consequences that could flow from such 'default.' As a consequence, she was never advised of the very important rights she was waiving by not appearing at the settlement conference. Then, the court compounded the situation by depriving her, through counsel, of the opportunity to cross-examine the very social workers who prepared the reports in support of the jurisdictional facts in the petition." (*Id.* at p. 1426.)

In *In re Wilford J.* (2005) 131 Cal.App.4th 742 the father, who did not appear at the detention hearing, was given a "generic notice" of the next hearing which advised him of basic rights, but did not advise him of the nature of the proceedings. The proceedings were in fact a pre-trial resolution conference. Father, who was not represented, did not appear, and the court proceeded with a jurisdictional hearing. On appeal, the father contended that his due process right to notice had been violated. Division 7 of this Court agreed: "Converting a noticed [pre-trial resolution conference] into an unscheduled jurisdictional hearing, absent appropriate waivers from the parties or their counsel,

deprives parents of vitally important procedural protections that are essential to ensure the fairness of dependency proceedings." (*Id*. at p. 747.) "Although the failure to respond to a court order to attend a [pre-trial resolution conference] may serve as the basis for an award of sanctions (Local Rule 17.22(a); see Code Civ. Proc., § 177.5), nonappearance at a [pre-trial resolution conference] does not justify conducting an entirely different proceeding or entry of the absent party's 'default' on the allegations of the section 300 petition." (*Id.* at p. 750.)

As DCFS argues, this case is unlike *Dolly D*. and *Stacy T*., in that appellant was repeatedly warned that the court would proceed in her absence, and is unlike *Wilford J.* in that appellant was represented. Further, appellant was given at least one notice that a jurisdictional and dispositional hearing would be held, and could be held in her absence. These are real and meaningful differences, relevant to due process. However, it is also true that appellant's notice of the December 8 hearing was notice of a mediation, and that she was told by the court that the mediation would proceed without her, not that a jurisdictional and dispositional hearing would so proceed. We thus cannot agree with DCFS that appellant was adequately advised, a finding which would end our discussion.

However, we do not find reversible error. First, this was not the kind of a default proceeding which took place in the cases just cited. Appellant's counsel did not inform the court that appellant wished to cross-examine the social worker or to present evidence. Instead, the import of appellant's objection was that the mediation had not been completed, and that appellant was not in full agreement with the draft language. Appellant did not seek a continuance so that witnesses could be secured, but only enough time for the presence of appellant's assigned counsel. We cannot see that appellant truly sought a "contest."

Further, the court did not simply find the allegations of the petition true, as did the courts in *Stacy T.* and *Wilford J.* Instead, the court sustained an amended petition, drafted by a mediator, after a mediation in which appellant participated. Counsel for DCFS represented that appellant had agreed to the language, and although appellant's counsel

said that she had not, counsel did not tell the court what appellant's objections were. We thus cannot tell whether the sustained petition or the dispositional order meaningfully depart from matters appellant agreed to, and cannot say that appellant has established reversible error. (*In re Wilford J.*, *supra*, 131 Cal.App.4th at p. 754.)

This is especially true because we to some extent agree with DCFS that any error was harmless beyond a reasonable doubt. (*In re Dolly D.*, *supra*, 41 Cal.App.4th at p. 446.) Appellant's altercation with A. was well-documented by both police and social workers, with consistent accounts given by A., Anthony, Destiny, and to some extent appellant herself. Further, appellant herself represented in court that the children's father had not provided for them. As to those allegations, we see no reasonable probability that the outcome would have been different if appellant had been given notice of a jurisdictional hearing, rather than a mediation.[2] (*In re Celine R.* (2003) 31 Cal.4th 45, 60.) And, given the altercation with A., we see no reasonable probability that the dispositional order removing the children from appellant's home would have been different.

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[2] *In re Stacy T.*, held that a "parent's fundamental right to adequate notice and the opportunity to be heard in dependency matters involving potential deprivation of the parental interest [citation] has little, if any, value unless the parent is advised of the *nature* of the hearing giving rise to that opportunity, including what will be decided therein. Only with adequate advisement can one choose to appear or not, to prepare or not, and to defend or not." (*In re Stacy T.*, *supra*, 52 Cal.App.4th at p. 1423.) Yet, appellant had missed three appointments with DCFS -- appointments which would have allowed her to visit her children -- and, as DCFS noted, was "going through" the recent death of her sister in a car accident, the loss of her job, apartment, and belongings. It is difficult to imagine that she had made a deliberate choice to skip the hearing because it was only a mediation.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.